No. 450

Office - Supreme Court, U. S.
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OCT 28 1944
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# Supreme Court of the United States

OCTOBER TERM 1944.

BERT ERDMAN,
*Libelant-Petitioner,*

*against*

UNITED STATES OF AMERICA, AMERICAN LINE STEAMSHIP CORPORATION and ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA,
*Respondents.*

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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### STATEMENT.

A passenger injured himself by going into a swimming pool which he knew was closed and which he knew was dangerous (874)*. The District Court held that both the carrier and the passenger were at fault and divided the damages. The Circuit Court of Appeals found that the carrier was not negligent and dismissed the libel.

The question which the libelant says is presented by the decision below does not in fact exist and there is no ground for a grant of certiorari.

* References are to the pages in the record.

## The Facts.

Libelant, an adult fifty years old, was a passenger on a trip from New York to the west coast by way of Havana and the Canal. While the vessel was at sea, he entered a swimming pool which was not yet ready for use by passengers and which was not open to them and which was being filled. It was one hour after his accident before the pool was finally filled and ready for use. At that time, it was opened for use of passengers and was used with safety (657).

The libelant had been in the pool the day before. On the day of his accident and about an hour before it occurred, he had been out near the pool and had seen that its filling had commenced (854). A half hour later he again went out to the pool in a bathing suit. At that time, the pool was about half full (853). He and other passengers remained on the deck around the pool, most of them in bathing suits (733). During this time, libelant had opportunity to and did observe conditions around the pool (874). The vessel was pitching and rolling and the wind was coming over the port bow. This caused the water in the pool to swash back and forward, so that at times part of the bottom of the pool was visible (736, 415). The waves in the pool were three feet high and were being thrown a distance of four feet into the air so that they went over the top of the pool and on to the deck (854, 855).

At each side of the pool, near the rear of it, there were entrance steps which led up to a raised platform approximately 22 inches high which completely surrounded the pool (627, 628). Across these entrance steps was a removable rope which was taken down when the pool was in use but was intended to be up when the pool was not in

use (868, 635). There were other ropes permanently around the pool so that when the guard rope was up over the entrance steps, the pool was entirely closed off by a rope (868).

Although there were other passengers, including children, in bathing suits, in the immediate vicinity of the pool, no passenger, except the libelant attempted to enter the pool until it was filled one hour after the accident (517, 518, 733, 874).

Three of the other passengers testified that they knew the pool was not open for use by them (405, 746, 804, 809).

There was a dispute in the evidence as to whether the guard rope was in place across the entrance steps at the time libelant entered the pool. The respondents' witnesses, among them two passengers, said that they saw the libelant "duck under" the guard rope which they saw in position (414, 513, 810) and which was seen in position by six of the ship's personnel who, at the time they gave their testimony, were disinterested (501, 580, 607, 613, 638, 764). After going under this rope, the libelant descended the pool ladder and took a flat dive into the pool. The swashing of the water washed him against the side of the pool, causing his injuries (871).

One of the libelant's witnesses, a passenger (728), and two of the passenger witnesses for the respondents (415, 815), said that libelant sought to time his dive so that he would enter the pool at a time when most of the water was at his end, but that he evidently mistimed his entry because there was very little water at the point where he entered. None of the courts made a finding either way on this particular action of the libelant although his actions showed a lively appreciation of the sporting chance he was taking with the dangers of the pool.

Other evidence which the respondent-carrier produced indicated that the libelant's injuries were sustained by his striking the bottom when he dove into the shallow water (415, 845, 815). This was supported by evidence the libelant himself gave, that, when he dove, his hands were at his side so that he led with his head (871). This type of dive is what is known as a sailor's dive and there is a tendency of the feet to overtake the head. However, the District Court did not accept the evidence of the respondents on this point but found that, although libelant had taken a shallow dive into the pool, he was not injured at that time but an instant later when he was washed against the side of the pool (871).

During the time that libelant was around the pool and at the time he entered, there was a steward around the pool who was in reality merely a waiter. His job was to attend to the wants of the passengers around the pool and he frequently was required to leave the pool to fetch sandwiches, beverages, deck chairs, mats and other articles for the personal comfort of the passengers (498, 524, 528).

At no time throughout the case was there any dispute as to the duties of this steward, whose name was Jensen. It was the libelant's theory, and all the evidence in the case supported it, that the steward, Jensen, had absolutely no duties whatever with respect to notifying or warning passengers concerning whether the pool was open or closed or whether they were permitted to go in (872)

Furthermore, there was no evidence on the part of the libelant that he had any other understanding of the position and duties of the steward, Jensen.

There was evidence in the case that Jensen had joined two of the passengers in advising Erdman not to enter the pool because it was obviously closed and because it

was obviously dangerous (809). This warning by Jensen was offered on the question of contributory negligence and assumption of risk, and from the inception of the case there has never been any suggestion by either libelant or respondents that Jensen, in giving the warning, was performing any duty for the respondent-carrier.

The District Court found that Jensen had not given the warning but noted that two passengers had testified that they had warned the libelant (859). At the same time, the court found that Jensen had no duty to give the warning in question (872). The reason for this finding was that all of the evidence supported it, there was no evidence to the contrary, and the libelant requested such a finding specifically (872).

It was also at the request of the libelant that the District Court made conclusions of law to the same effect (876-877).

In the assignments of error presented to the Circuit Court of Appeals, the libelant did not complain that the District Court had erred in making such finding of fact and conclusions of law (892-897).

Notwithstanding that the libelant thus produced the finding in the District Court that Jensen had no duty to give him any warning whatever, the libelant now asks this court to hold that the District Court erred in finding as it did. Thus, the question now raised in this court is not presented by the record. The evidence is to the contrary. The findings and conclusions are to the contrary. And the libelant himself was responsible for this result. As will appear later herein, the Circuit Court of Appeals took the same view.

The libelant, in his brief in the Circuit Court of Appeals, for the first time made some reference to the doctrine of

last clear chance. The Circuit Court of Appeals in its opinion said:

> "There was some slight evidence that the respondents did have a last clear chance to prevent his going into the water after he had started down the ladder into the pool, but it was not enough to support any finding to that effect and none was made" (907).

This reference in the opinion of the court was not to Jensen, the steward. It referred to the fact that a master-at-arms, Gisbart, while on his way to the pool, glanced through a window, two decks above the pool, and saw the libelant just before he was ready to dive into the pool. Gisbart proceeded immediately to the pool, two decks below, but, when he got there, the accident had already occurred (579, 580). There is no evidence in the case sufficient to support a finding that Gisbart could have taken any action which would have been effective to save the libelant from his folly. The libelant did not ask the District Court to make any finding with respect to Gisbart nor did he complain in his assignments to the Circuit Court of Appeals that the District Court had failed to make such findings.

It is significant that the majority of the Circuit Court of Appeals made no reference whatever to the steward, Jensen. This was obviously because the libelant's case was premised on the evidence that Jensen was not the carrier's servant for the purpose of warning passengers concerning their entering the pool.

The dissenting judge does not mention the master-at-arms, Gisbart, but does mention the steward, Jensen. The dissent is based upon a conclusion that, as a matter of law, the carrier may not have any servant, however menial, in contact with passengers for any purpose, without charging the servant with the additional duty of warn-

ing "notoriously wayward and lawless" passengers, who "do not obey instructions," against trespassing in forbidden parts of the vessel (907).

### The Decision of The District Court (850-878.)

When the trial was nearly over, the District Court indicated that it recognized the crucial importance of the question of whether the guard rope was in position across the entrance steps of the pool. It stated to the libelant with respect to the absence of this rope as follows:

> "The Court: That is your main case. If you do not prove that, you are out of luck, that is all" (695).

However, the District Court was not able to reach any conclusion concerning the presence or absence of the rope and decided the case on the premise that the question was unimportant. It then made a number of findings concerning the negligence of the carrier, everyone of which was unjustified if the guard rope was in fact present across the entrance steps to the pool.

The reason the District Court made the findings referred to, was that it was unable to reach a conclusion concerning the presence or absence of the rope across the steps. For instance, the District Court found that there was no sign of warning to passengers not to use the pool but on the contrary there was a continuous invitation to passengers to use it. However, this could not be true if the rope was in position across the entrance steps, because in that event there was no invitation to use the pool and the libelant himself admitted that such a rope was sufficient warning to keep him out of the pool (690).

Again, the District Court found there were no regulations posted, informing passengers when and under what

conditions the pool might be used. However, here again the means adopted by the carrier and carried out by its officers and seamen, viz.: the short guard rope over the entrance steps of the pool, was sufficient to inform passengers that the pool was not to be used and was so regarded by Erdman (690) and other passengers (408, 804).

Moreover, the respondents' evidence showed that this same method had been in use on this ship and sister ships with similar pools, for two years and had satisfactorily served the purpose of keeping passengers out of the pool (658, 659).

Again, the District Court found that neither the master nor any other officer of the ship issued any orders to any of the ship's personnel that passengers were to be kept out of the pool. But the master-at-arms had performed his routine duty of putting the guard rope in position across the entrance steps (564, 566, 575) and the officers on the bridge had looked down and seen that it was in position (761, 762), and on Erdman's own admission at the trial, this was a sufficient barrier to keep him out of the pool (690).

The District Court also found that the libelant himself was guilty of negligence because he knew the vessel was rolling and pitching and saw the agitated condition of the water in the pool and the water from the pool splashing over the deck and that none of the other prospective bathers entered the pool. These conditions gave him notice that it was somewhat dangerous to enter (874).

The respondents appealed to the Circuit Court of Appeals on two grounds. The first was that the libel should have been dismissed because the findings of the District Court concerning the conduct and knowledge of the libelant were tantamount to a finding of assumption of risk by him

and not merely contributory negligence. In fact, the negligence which the court found him guilty of consisted of his entering a pool which was not yet filled, when he knew it was "somewhat dangerous" to do so (874).

A second ground for the respondents' appeal was that the libel should have been dismissed because of the failure of the libelant to prove that the guard rope across the entrance steps was not in position.

THE DECISION OF THE CIRCUIT COURT OF APPEALS (903-908).

The majority of the court held that when the carrier introduced evidence of the presence of the guard rope over the entrance steps, the burden of proof was on the libelant to satisfy the trial court, by a fair preponderance of the evidence, that this rope was not in place. This was so because of his admission that the rope was all he needed as a warning not to pass it. The court said:

> "He then testified that no rope was up, and added, 'I would not stoop, bend or get under any rope under any consideration to get into the pool'. This answer shows beyond question that the rope when in place was all that he needed as a warning not to go past it and into the pool" (905).

The court held that adult passengers need not be treated by the carrier as though they were wholly lacking in intelligence and common sense and that the libelant, having knowledge that the pool was not open to him, could not require the carrier to give him an additional warning of the specific danger which overtook him (906).

It was not necessary for the Circuit Court to pass upon the libelant's negligence, but the decision and the words

of the opinion imply that the rope barrier was a warning of danger, and that he was solely at fault.

Nor was it necessary for the majority of the Circuit Court to pass upon the carrier's contention that the passenger had assumed the risk of his injury when he entered the pool with knowledge of danger.

The dissenting judge agreed with the majority that, for purpose of establishing negligence on the part of the carrier, the libelant had the burden of proving that the guard rope was not in position across the entrance steps (907).

However, the dissenting opinion goes much further than the majority in holding that the facts of the case established beyond question that not only was there no invitation to the libelant to use the pool, but, on the contary, the circumstances indicated plainly to him that the pool was closed and that he was forbidden to use it (907-908).

The dissenting judge said that this was true even if it be assumed that the guard rope was not in place across the entrance steps.

For purposes of discussing contributory negligence, the dissenting judge assumed that the guard rope was not in position across the steps but said:

> "Nevertheless, no other passenger did try to go in, and, even though the guard rope was not in place, it was apparent that the pool was not yet ready for passengers" (908).

He referred to the pool (with the guard rope down) as "obviously not intended for passengers" and said "a pool that is being filled is not a pool meant for passengers. Anyone who uses it is charged with the knowledge that the ship

is not extending to him the usual protection'' (908). These words indicate beyond cavil that the dissenting judge found that libelant knew the pool was closed to him even if the guard rope had not been in place.

With the guard rope in place, the dissenting judge thought that it could have no other meaning but—Stay out of the pool; and—Stay out because it is dangerous (907). Yet he held that, despite the warning of danger to libelant's person which was given to him when the guard rope was in position across the entrance steps and despite the trespass which libelant knew he was committing, whether the rope was or was not in position, the libelant was nevertheless entitled to a still further oral warning from the steward who, everybody concedes, was not there for that purpose. Even here, the dissenting judge does not say that the steward should have warned him of danger. He should merely have said ''Do not enter the pool'' (908)

Having decided that the carrier must take more than one or two means of bringing home to the libelant the fact that the pool was closed, the dissenting judge was compelled to deal with the carrier's defense of assumption of risk. On this subject, the dissenting judge said that, with the rope in position, the libelant knew that the pool was not safe. He also made the following observations on the assumption that the guard rope was not in position:

> ''* * *. I think that, if a passenger uses a part of the ship which is obviously not intended for passengers, he takes some chances. * * *. Anyone who uses it, is charged with knowledge that the ship does not extend to him the usual protection.
>
> ''* * * A man may take some chances without taking other chances of which he has no warning. All that Erdman should be charged with was the general dangers which might be present when he

> went where passengers should not go; not with foreseeing that, when the ship pitched, the swash of the water would have such force as it did. His disregard of his safety was not to be measured as exposing him to that specific danger * * *'' (908).

In its brief, the carrier had cited decisions of federal and state courts to the effect that to be held guilty of assumption of risk, it was not necessary that an injured person know of every danger which might overtake him, nor of the specific one which overtook him. It was sufficient if he knew that there was some danger. The dissenting judge, without citing any case to the contrary said: ''There are no doubt expressions to that effect in the books, but it seems to me that this is plainly wrong'' (908).

Regardless of the correctness of the dissenting judge's conclusions with respect to respondent's negligence and libelant's assumption of risk, it is clear that he did not have in mind that this case involved the doctrine of last clear chance. All that he could see was a simple case of the concurrence of libelant's negligence with the supposed negligence of the respondent-carrier. Concurrent negligence is, of course, incompatible with the fundamental notion behind the doctrine of last clear chance. *Jerrell* v. *New York Central Railroad Co.*, 68 F. 2nd 856 (C. C. A. 2nd, 1934, opinion by Judge Learned Hand who wrote the dissent in the case at bar). See also cases cited in petitioner's brief, page 19.

## The Question Presented.

The only question which the libelant has sought to raise in this court is one based on a supposed application of the doctrine of last clear chance. However, the record

does not present any such question. What is presented by this record is as follows:

The District Court did not make any findings with respect to last clear chance. With respect to Jensen, the steward, the uncontradicted evidence, which both sides introduced, afforded no justification in fact or in law for the application of the doctrine. With respect to the master-at-arms, Gisbart, there was no evidence that it was physically possible for him to intervene in time to stop the continuing negligent act of the libelant in proceeding, with knowledge of danger, into the pool.

The libelant did not assign error to the District Court's findings or failure to find with respect to either Jensen or Gisbart. The majority of the Circuit Court of Appeals did not disturb the findings of the District Court in any respect. Even the dissenting judge could not discover in this case anything resembling the doctrine of last clear chance.

This case, therefore, calls for the application of the rule that the Supreme Court will not interfere with findings made by two lower courts. *Just et al.* v. *Chambers, Executrix,* 312 U. S. 383, at page 385. The rule is as applicable where there is a refusal to find as where positive findings are made. *Commercial Molasses Corp.* v. *N. Y. Tank Barge Corp.,* 114 F. 2nd 248, affirmed 314 U. S. 104. Within the principle announced in that case, the failure of two courts to find that there was a basis for the application of the doctrine of last clear chance, is equivalent to an affirmative finding in both courts that there was not.

## POINT I.

THE CARRIER MET ITS FULL DUTY TO THE LIBELANT WHEN THE CIRCUMSTANCES REVEALED TO HIM THAT THE POOL WAS CLOSED.

It is settled law, as the majority of the court found, that the duty of the carrier to the libelant was fulfilled if he knew he was not permitted to enter the pool. The question is entirely one of invitation or lack of invitation.

This precise point came to the notice of this court in *Aschenbrenner* v. *U. S. F. & G. Co.*, 292 U. S. 80. In that case a passenger at a station attempted to board a moving train. The Supreme Court noticed that in all jurisdictions such a person was deprived of recovery. In some jurisdictions this was placed upon the ground that the high degree of care which a carrier owes a passenger did not attach to one who was seeking to board a moving train, because the implied invitation to board the train was withdrawn as soon as it began to move, and such a person did not attain the privileged status of passenger. In other jurisdictions, the courts regarded the injured person as a passenger whether he had boarded the vehicle or not, but, nevertheless, denied him recovery on the ground that the passenger was attempting to go to some portion of the carrier's premises to which he was not invited. Having made these remarks about decisions in other jurisdictions, the Supreme Court gave its own opinion concerning passengers who go to places on carriers' vehicles without invitation. The Supreme Court said, page 84:

> "* * *. Yet the negligence of a passenger in going into a known place of danger without the inducement or invitation of the carrier may bar

> his recovery for the resulting injury, even though the passenger-carrier relationship has begun and continues. * * *."

In *New Jersey Steamboat Co.* v. *Brockett,* 121 U. S. 637 the carrier had not allowed passengers to go to a certain portion of the deck. Plaintiff, a passenger, went to that part of the deck and the servants of the carrier, in removing him, used more force than was justified and assaulted him. The court held the carrier liable for the assault but plainly implied that had the passenger been injured while in the forbidden area in a manner otherwise than by assault, he could not have held the carrier liable. The court said, page 645:

> "* * *. If the injuries necessarily arose from his violation of the regulations established for deck passengers, the carrier would not be responsible therefor. * * *."

In the present case, both the majority and the dissenting judge in the Circuit Court of Appeals were in agreement that the libelant knew he was not invited into the pool. The majority said this was so because the guard rope was across the entrance steps and libelant had testified that he knew what that meant. The minority said so because it thought that such a rope must have meant not only that the pool was closed to the passenger but also that it was dangerous for him to go in. The minority went even further and stated that even if the rope had not been in position, the libelant must have known he was not invited to enter the pool. On this point, the language used by the dissenting judge is significant,

> "* * *, even though the guard rope was not in place, it was apparent that the pool was not yet

> ready for passengers. * * *. A pool that is being filled is not a pool meant for passengers. Anyone who uses it, is charged with knowledge that the ship does not extend to him the usual protection'' (908).

It is true that the judge was using this language in discussing the passenger's contributory negligence. However, his language establishes, that the reason for the passenger's negligence was the fact that he knew he was not invited into the pool.

The rule of non liability to passengers who go into places where they are not invited, is founded upon the premise that common carriers are entitled to assume that passengers will exercise ordinary prudence and common sense for their own safety. *In Re Keansburg Steamship Co.*, 249 Fed. 472. *The Tourist*, 265 Fed. 700. *The Empress of Scotland* 11 F 2d 783.

If it is true, as even the dissenting judge said, that the guard rope in place across the entrance steps, not only meant that passengers were to stay out of the pool but also that they were to stay out because it was dangerous, it is difficult to understand how anything further, short of force used on the plaintiff, would have prevented the accident. It must be remembered that the libelant himself admitted at the trial that a rope in place across the entrance steps was an adequate barrier which he would not pass. It is hard to see how such a person would have had more regard for the superfluous word of a menial servant whose appearance belied any suggestion of authority.

In his brief, the libelant argues that the rope could not have been enough in this case because the libelant ducked under it and went into the pool. This same argument could be used to justify any conduct of any intractable passenger who refused to obey appearances, signs or oral warnings.

According to this theory, the carrier would have the burden of so delicately adjusting his use of physical force as to avoid, on the one hand, too great a use of it, which would result in liability for an assault and, on the other, using too little, which would result in liability for negligence.

But it is well settled that the use of physical force is not necessary. This is nowhere better expressed than in *Bridges v. Jackson E.R.L. & P. Co.*, 86 Miss. 584, where the court said, page 595:

> "* * * In the case of Indianapolis R. R. v. Rutherford (Ind.), 92 Am. Dec., 336, the court held that the duty of the carrier does not extend to barricading its cars and imprisoning its passengers so as to prevent them by their recklessness and folly from voluntarily exposing themselves to needless perils or obvious dangers. Such a doctrine would give power to railway officials to so restrain the liberty of their passengers in every respect that they could not by any act of their own put themselves in unnecessary danger, for such a power must necessarily exist if the duty to exercise it exists. The obligation to answer in damages cannot be separated from the authority to do what is necessary to avoid liability. Carriers have not, and ought not to have, any such powers, and hence no liability results. Their passengers are not their slaves. Though passengers, they are nevertheless free men. * * *."

The case of *The Arabic*, 50 F. 2d 96, relied upon by the libelant, is not to the contrary. That case is entirely different from the one at bar. There the passengers, while in their usual and ordinary places about the deck or even in their rooms, were, unbeknownst to themselves, in extreme peril to their very lives because the vessel, while in shallow waters, was about to encounter a hurricane. The passengers were in danger no matter where they stayed (short of their

beds). In such circumstances, the court held that the carrier should either have forcibly taken them to their beds or warned them that they would be seriously injured if they stayed elsewhere. The judge who wrote the opinion in that case was one of the judges who comprised the majority of the case at bar.

In the case at bar, the libelant was in a safe place but chose to enter a place which he knew was "somewhat dangerous" and which all the judges of the Circuit Court of Appeals said he knew he was forbidden to enter.

## POINT II.

THE CARRIER WAS NOT RESPONSIBLE FOR THE STEWARD JENSEN'S FAILURE TO WARN.

The dissenting judge cites no authority in support of his holding, and the authorities the respondents have been able to find look the other way.

It is well settled that a master is not liable for the acts of servants which he has not charged them with the duty of performing. *Kuhn* v. *The City of New York*, 274 N. Y. 118. *Ford* v. *Grand Union Company*, 268 N. Y. 243.

*A fortiori* the master is not liable for the failure of a particular servant to perform an act which he has not charged him with the duty of performing.

It is undisputed in this case that Jensen was not the carrier's agent for notifying passengers with respect to the use of the swimming pool. Neither side made any contention that he had any such duties. In fact, Jensen himself said that he had none and the court so found and this finding was made at the express request of the libelant.

It seems clear that the libelant tried his case with the view of first persuading the court that Jensen had not given

him any warning, and, if he failed in this effort, he wished to be in a position of then having the court find that, even though Jensen had warned him, still Jensen was merely a steward and the warning did not bear the authority of the carrier. In other words, it would not negative the invitation which the libelant assumed existed and on which he was relying. Having succeeded in his first purpose of obtaining a finding that Jensen did not warn him, he now belatedly changes his second purpose and asks to have the carrier bound by the omission of its unauthorized servant. Not only the law but simple justice should prevent him from succeeding.

## POINT III.

### The libelant assumed the risk of his injury.

The District Judge held that the libelant knew that entry into the pool was "somewhat dangerous." He entered a conclusion of law that "libelant as a passenger aboard the ship assumed certain risks in using the advantages of the ship" (878).

The majority of the Circuit Court, having decided for the carrier on another ground, did not have to pass on the carrier's contention that the libelant, having knowledge of danger in entering the pool, assumed the risk of the injury which overtook him.

The minority judge in the Circuit Court of Appeals thought that the libelant assumed only the risks of "general dangers which might be present when he went where passengers should not go".

The dissenting judge did not say what these general dangers were, except to indicate that they were something different from the specific risks which overtook the libelant.

He did not cite any case for this distinction and thought that the expressions in the books to the contrary were "plainly wrong".

It is submitted here that the cases in the books are correct. They establish the rule that the doctrine of assumption of risk cannot be attenuated by an inquiry into what specific dangers the person had in mind when he entered a place where he knew there was danger of injury to his person.

In the opinions, the word "danger" and "injury" are used interchangeably. In *Louisville & N. R. Co.* v. *Kemper*, 47 N. E. 214, 147 Ind. 561, the court said, page 216:

> "* * *. There has been no effort in the decisions to place the doctrine of the assumption of risks upon the narrow distinction that one may know of danger, but, if he do not fully appreciate its extent, there is no assumption * * *."

That case was cited by the Circuit Court of Appeals for the Sixth Circuit in *Detroit Crude-Oil Co.* v. *Grable*, 94 Fed. 73 at page 80.

In *Houston's Adm'x* v. *Seaboard Air Line Ry.*, 123 Va. 290, 96 S. E. 270, the court said, page 299:

> "The particular injury sustained need not have been apprehended nor the danger thereof fully realized, * * *."

And at page 300:

> "* * *. He need not have in mind at the time he assumed the risk the particular danger which subsequently resulted in his injury."

The matter is simply stated in *Davis* v. *Somers-Cambridge Co.*, 79 N. E. 233 (Ohio), where the court said, page 235:

"* * *, and it does not matter that he did not know, and did not appreciate the precise extent or character of the injury he would sustain in the event of an explosion. To adopt such test would be to introduce into the doctrine of assumption of risk a wholly impracticable element and a rule of greatest uncertainty. The rule is, that one who exposes himself to an obvious and appreciated danger, even though he should not appreciate the full extent of the danger, assumes the risk of injury that may result to him therefrom. * * *."

Other decisions are as follows:

*Feely* v. *Pearson Cordage Co.*, 37 N. E. 368, 161 Mass. 426;

*Luebben* v. *Wisconsin Traction, Light, Heat & Power Co.*, 154 Wis. 378, 141 N. W. 214;

*Dodge* v. *Kaufman et al.*, 152 Wis. 171, 139 N. W. 741;

*Hanson* v. *Superior Mfg. Co.*, 136 Wis. 617, 118 N. W. 180.

## LAST POINT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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